IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRANCE FOWLER,	)	
Petitioner,	)	
	)	**C.A. No. 14-151 Erie**
v.	)	**Electronically Filed**
	)	**Magistrate Judge Susan Paradise Baxter**
JON FISHER, et al.,	)	
Respondents.	)	

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

AND NOW comes the Commonwealth of Pennsylvania by and through its representative Lisa R. Ferrick, Assistant District Attorney, Erie County, Pennsylvania, and files this Answer to Petition for Writ of Habeas Corpus and in support thereof avers as follows:

I. PROCEDURAL HISTORY

Petitioner, Terrance Fowler a/k/a Terrence Lee Fowler, was charged at Docket Number 2536 of 2010 with one count each of Criminal Attempt/Homicide (F1), Aggravated Assault (F1), Recklessly Endangering Another Person (M2), Criminal Conspiracy/Robbery (F1), Robbery (F1), and Possessing Instruments of Crime (M1). Attorney David G. Ridge represented Petitioner on these charges. Prior to the jury trial starting, Attorney Ridge filed a Notice of Alibi Defense in which he listed four defense alibi witnesses, including Petitioner. Petitioner's case proceeded to trial on July 14, 2011, and on July 15, 2011, a jury convicted Petitioner of all counts, except the charge of Recklessly Endangering Another Person, which the trial court found merged with the charge of Aggravated Assault. For that reason, the trial court did not instruct the jury on the charge of Recklessly Endangering Another Person.

On September 13, 2011, Attorney Ridge filed Post Trial Motions Pursuant to Rule 606 and 607 of the Pennsylvania Rules of Criminal Procedure on Petitioner's behalf. The trial court denied Petitioner's Post Trial motions by Order dated September 19, 2011.

On September 20, 2011, the trial court sentenced Petitioner to an aggregate period of incarceration of 330 months to 660 months (27 1/2 to 55 years). Attorney Ridge filed a Post Sentence Motion: Motion for Modification of Sentence on September 28, 2011, which the trial/sentencing court denied by Order dated October 10, 2011. Upon his request, the court allowed Attorney Ridge to withdraw as Petitioner's counsel on October 13, 2011.

On November 10, 2011, Petitioner filed a Notice of Appeal with the Superior Court of Pennsylvania. Attorney Darrel J. Vandeveld and Attorney Nicole Sloane represented Petitioner on direct appeal. On December 6, 2011, Attorney Vandeveld filed a Statement of Matters Complained of on Appeal. In the Statement of Matters Complained of on Appeal, Attorney Vandeveld raised two issues: the verdicts were against the weight of the evidence (for various reasons) and the trial court erred by denying Petitioner's Motion to Modify Sentence (for various reasons). The trial court issued its Memorandum Opinion on December 9, 2011. The Superior Court of Pennsylvania affirmed the judgment of sentence on June 1, 2012, at docket number 1787 WDA 2011.

On April 16, 2013, Petitioner filed a *pro se* Petition for Post Conviction Relief Act ("PCRA motion"). In his PCRA motion, Petitioner raised the following five ineffective assistance of trial counsel issues: 1) ineffective for failing to request an alibi instruction after presenting alibi evidence at trial; 2) ineffective for failing to file a Motion to Suppress the Commonwealth's key witness in-court identification; 3) ineffective for failing to request a curative instruction when the Commonwealth admitted prejudicial evidence at trial; 4) ineffective for failing to object to the jury venire panel that did not represent a fair cross section of the community; and 5) ineffective for failing to request a Kloiber instruction. The PCRA court appointed counsel to represent Petitioner in his PCRA matters. On May 20, 2013, Attorney Tina M. Fryling filed a Supplemental Motion for Post Conviction Collateral Relief on Petitioner's behalf. On June 21, 2013, the PCRA court filed an Opinion and Notice of Intent to Dismiss

PCRA Without Hearing Pursuant to Pa.R.Crim.P. 907(1). On July 17, 2013, the PCRA court issued a Final Order denying Petitioner's PCRA motion.

On August 14, 2013, Petitioner filed a direct appeal from the denial of PCRA relief. The PCRA court filed its Memorandum Opinion (or lack thereof) on August 27, 2013. The Superior Court of Pennsylvania affirmed the denial of PCRA relief on March 3, 2014, at docket number 1330 WDA 2013. Petitioner did not file a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania.

Petitioner filed the instant Petition for Writ of Habeas Corpus on or about May 23, 2014.[1] In it, Petitioner argues he is entitled to Habeas Corpus relief on the following grounds: 1) ineffective assistance of trial counsel for failing to request an alibi instruction after presenting alibi evidence at trial; 2) ineffective assistance of trial counsel for failing to file a Motion to Suppress the Commonwealth's eyewitness' in-court identification; 3) ineffective assistance of trial counsel for failing to request a curative instruction when the Commonwealth admitted prejudicial evidence at trial; and 4) ineffective assistance of trial counsel for failing to request a Kloiber instruction.

II. COGNIZABLE CLAIMS IN FEDERAL HABEAS CORPUS PROCEEDINGS

A state prisoner may seek federal habeas relief only if he is in custody in violation of the United States Constitution or federal law. 28 U.S.C. §2254(a); *Smith v. Phillips*, 455 U.S. 209 (1982); *Geschwendt v. Ryan*, 967 F.2d 877 (3d Cir. 1992), cert. denied, 506 U.S. 977 (1992); *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), cert. denied, 502 U.S. 902 (1991). Violations of state law or procedural rules alone are not sufficient; a petitioner must allege a deprivation of federal rights before federal habeas relief may be granted. *Engle v. Isaac*, 456 U.S. 107 (1982); *Wells v. Petsock*, 941 F.2d 257 (3d Cir. 1991), cert. denied, 505 U.S. 1223 (1992). A federal court's scope of review is limited since its role is not to retry state cases *de novo*, but to examine the proceedings in the state court to determine if there has been a violation of constitutional standards. *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Milton v.*

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[1] The parties and the lower courts filed other documents that were not referenced in the Commonwealth's Answer as they are neither relevant to, nor dispositive of, this Habeas Corpus Petition.

Wainwright, 407 U.S. 371 (1972). A habeas petitioner must show the state court's decision was such a gross abuse of discretion that it was unconstitutional; "ordinary" error is outside the scope of review. 28 U.S.C. §2254.

Generally, claims of ineffective assistance of counsel are proper subjects for habeas relief. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Some claims of ineffective assistance, however, seem to center on state grounds and therefore are not proper subjects for habeas relief. The ineffectiveness of counsel during Federal or State collateral post-conviction proceedings is not a cognizable ground for federal habeas relief. 28 U.S.C. §2254(i).

Petitioner's four claims allege ineffective assistance of trial counsel and are therefore cognizable in a federal habeas corpus proceeding.

III. STATUTE OF LIMITATIONS

Pursuant to the Anti-terrorism and Effective Death Penalty Act of 1996, ("AEDPA"), effective April 24, 1996, the statute of limitations for filing a petition for writ of habeas corpus is as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C.A. §2244(d).

In the instant case, a jury convicted Petitioner on July 15, 2011, and the trial court imposed sentence on September 20, 2011. The Superior Court affirmed the judgment of sentence on June 1, 2012.

Since Petitioner did not file a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, Petitioner's judgment of sentence became final thirty days later, on or about July 1, 2012. Therefore, the time for filing a federal habeas corpus petition began to run on July 2, 2012. When Petitioner filed a *pro se* PCRA motion on April 16, 2013, such filing tolled the statute of limitations for filing a federal habeas corpus petition. From April 16, 2013, through April 3, 2014, the statute of limitations clock for federal habeas corpus filing purposes stopped during the pendency of Petitioner's PCRA and the collateral appeal period. The statute of limitations began to run again on April 4, 2014, and ran until Petitioner filed the instant petition on May 23, 2014. Hence, Petitioner filed the instant federal habeas corpus petition timely.

IV. EXHAUSTION

The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2254(b)(1)(A) requires that a state prisoner exhaust his available state court remedies before seeking federal habeas corpus relief. Habeas courts can not grant habeas corpus relief under §2254 unless the petitioner has exhausted the remedies available in the courts of the state. To satisfy the exhaustion requirement, the petitioner must first have fairly presented his constitutional and federal law issues to the appropriate state courts. In Pennsylvania, a petitioner need not seek review with the Pennsylvania Supreme Court to properly exhaust. Thus, to satisfy §2254(b)(1)(A), a petitioner must present his claims to the Pennsylvania Superior Court. A habeas petitioner successfully exhausts a claim by bringing it to the Superior Court either on direct appeal or during PCRA proceedings. *Branch v. Tennis*, 2009 U.S. Dist. LEXIS 33906 (E.D. Pa. April 22, 2009), citing *Leyva v. Williams*, 504 F.3d 357 (3d Cir. 2007); *Lambert v. Blackwell*, 387 F.3d 210 (3d Cir. 2004), and *Williams v. Folino*, 2008 U.S. Dist. LEXIS 7892 (E.D. Pa. Feb. 4, 2008).

Petitioner raised the following claims in this federal habeas petition:

(1) ineffective assistance of trial counsel for failing to request an alibi instruction after presenting alibi evidence at trial;

(2) ineffective assistance of trial counsel for failing to file a Motion to Suppress the Commonwealth's eyewitness' in-court identification;

(3) ineffective assistance of trial counsel for failing to request a curative instruction when the Commonwealth admitted prejudicial evidence at trial; and

(4) ineffective assistance of trial counsel for failing to request a Kloiber instruction.

Petitioner raised all four ineffective assistance of trial counsel issues in his *pro se*, timely filed PCRA motion filed April 16, 2013. After the PCRA court denied Petitioner PCRA relief, he appealed the denial to the state appellate court. On March 3, 2014, the Superior Court of Pennsylvania affirmed the denial of PCRA relief at docket number 1330 WDA 2013. Therefore, Petitioner exhausted the four ineffective assistance of trial counsel claims he now raises and they are properly before this court for federal habeas corpus review.

V. PROCEDURAL DEFAULT DOCTRINE

Exhaustion may also be satisfied when a petitioner is barred from raising his claims because Pennsylvania courts will no longer entertain them due to waiver or default. *Logan v. Vaughn*, 890 F.Supp. 427, 430 (E.D. Pa. 1995) (citing *Castille* at 346). Although defaulted or waived claims meet the technical requirements for exhaustion because no state forum is available, a petitioner may be barred from bringing such claims for federal court review under the "procedural default" doctrine. *Gray v. Netherland*, 518 U.S. 152 (1996); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Doctor* at 678; *Sistrunk v. Vaughn*, 96 F.3d 666, 678 (3d Cir. 1996). Like the exhaustion requirement, the procedural default doctrine was developed to promote our dual judicial system; it is based upon the "independent and adequate state ground" doctrine, which dictates that federal courts will not review a state court decision involving a question of federal law if the state court decision is based on state law that is "independent" of the federal question and "adequate" to support the judgment. *Coleman* at 750.

A state's procedural rules are entitled to deference by federal courts and a petitioner's violation of a state procedural rule may constitute an independent and adequate state ground for denial of federal review of a habeas claim. *Id.*; *Sistrunk* at 673. To prevent federal habeas corpus review under the procedural default doctrine, a state procedural rule must be "consistently and regularly applied." *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir. 1997), quoting *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988). Moreover, violations of a state's procedural rules may constitute an independent and adequate state ground sufficient to involve the procedural default doctrine even where no state court has concluded that a petitioner is procedurally barred from raising his claims. *Glass v. Vaughn*, 65 F.3d 13, 15 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 1027 (1996); *Carter* at 595. Federal habeas review is not available to a petitioner whose Constitutional claims have not been addressed on the merits due to procedural default unless a petitioner can demonstrate: 1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or 2) failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman* at 750; *Carter* at 595.

The United States Court of Appeals for the Third Circuit directs this Court to review petitioners' claims to determine whether any ambiguity exists as to whether a petitioner's inaction (i.e., his failure to comply with Pennsylvania procedural rules) constitutes procedural default under Pennsylvania state law. *Carter* at 595. If ambiguity exists, this Court should dismiss the petition without prejudice for failure to exhaust state remedies. *Id.* If a petitioner's failure to appeal his claims unambiguously constitutes procedural default under Pennsylvania law, this Court must determine whether cause and prejudice existed for the default or whether failure to consider a petitioner's claims would result in a fundamental miscarriage of justice. *Id.*

In this case, Petitioner exhausted his state court remedies on all four ineffective assistance of trial counsel claims since he raised them in his timely PCRA motion and then again on collateral appellate review. Thus, the procedural default doctrine does not apply to any of these issues.

A. Cause and Prejudice

To satisfy the cause standard, a petitioner must demonstrate that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court. *McClesky v. Zant*, 499 U.S. 467, 493 (1991); *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Neither a deliberate strategic decision nor an inadvertent failure of counsel to raise an issue constitutes "cause" unless counsel's performance failed to meet the Sixth Amendment standard for competent assistance. *Engle v. Isaac*, 456 U.S. 107 (1982); *Murray* at 485-487.

B. Miscarriage of Justice

If a petitioner cannot demonstrate the necessary "cause" and "prejudice," this Court may review the claims if the petitioner can show that a "fundamental miscarriage of justice would result from a failure to entertain the claim[s]." *McClesky* at 495. This Court may use its discretion to correct a fundamental miscarriage of justice if it appears that a "constitutional violation probably resulted in the conviction of one who is actually innocent." *Murray* at 496; see also *Coleman* at 748; *McClesky* at 502. Under the "miscarriage of justice" standard, a petitioner must present new evidence of innocence and persuade the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. *Schulp v. Delo*, 513 U.S. 298 (1995).

Since the procedural default doctrine does not apply to any of the issues Petitioner raised in this federal habeas corpus petition, the Commonwealth need not discuss the theories of "cause and prejudice" or "fundamental miscarriage of justice."

VI. MERITS OF PETITIONER'S CLAIMS

A. Ineffective Assistance of Trial Counsel For Failing to Request an Alibi Instruction After Presenting Alibi Evidence at Trial.

Ineffectiveness of counsel is cognizable only where there is a federal constitutional right to counsel: i.e., only through trial and first appeal as of right. See *Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987); *Ross v. Moffitt*, 417 U.S. 600, 616

(1974). Counsel's alleged deficient performance thereafter is no basis for a federal habeas claim. *Strickland v. Washington* provides a two-prong test for judging an ineffective assistance of counsel claim: (1) counsel's performance must have been deficient; and (2) counsel's deficient performance must have actually prejudiced the defense, i.e., there must be a showing that, but for counsel's deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* made it clear that judicial scrutiny of counsel's effectiveness must be "highly deferential." "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

The first prong of the *Strickland* test requires a petitioner to show that counsel made errors so serious (i.e., conducted himself so unreasonably) that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. "The evacuation of reasonableness must begin with a 'strong presumption that counsel' conduct falls within the wide range of reasonable professional assistance." *Government of the Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1430 (3d Cir. 1996) (quoting *Strickland* at 689). To determine whether counsel performed below the level expected from a reasonably competent attorney, it is necessary to judge counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct. *Strickland* at 690.

The second prong of the *Strickland* test requires the petitioner to demonstrate that counsel's errors were so serious as to deprive him of a fair trial. *Id*. To prove prejudice, a petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Id*. at 694. Furthermore, a petitioner must identify the acts or omission of counsel that are allegedly the result of unreasonable professional judgment. *Id*. at 690. Vague and conclusory allegations of ineffective assistance will not support habeas corpus review. *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991). Finally, to succeed on an ineffective assistance of counsel claim, a petitioner must make a sufficient factual showing to substantiate the claims. *U.S. v. Schaflander*, 743 F.2d 714, 721 (9th Cir. 1984).

Petitioner first claims trial counsel was ineffective for failing to request an alibi instruction after the defense had presented alibi evidence at trial. Specifically, Petitioner argues that his father, James Fowler, provided testimony at trial that proved Petitioner was home at the time the robbery occurred. "An alibi is a defense that places a defendant at the relevant time at a different place than the crime scene and sufficiently removed from that location such that it was impossible for him to be the perpetrator." *Commonwealth v. Sileo*, 32 A.3d 753, 767 (Pa. Super. 2011)(*en banc*) (citing *Commonwealth v. Collins*, 549 Pa. 593, 702 A.2d 540 (1997)).

In this case, the collective testimony was that the robbery occurred at approximately 11:20 or 11:30 a.m. James Fowler initially testified that Petitioner left his home between 8:00 and 8:30 a.m. on July 7, 2010, to take his fiancé to work and his daughter to daycare at the YMCA. Admitting he had not been looking at a clock on the day in question, he estimated that Petitioner was gone for less than an hour prior to returning to the house. James Fowler later testified that when the police arrived at his house around 1:00 p.m., Petitioner had been at his house for less than an hour, maybe 45 or 50 minutes. Considering that time frame, Petitioner would have arrived at James Fowler's house between 12:10 and 12:15 p.m. If that time frame was accurate, then Petitioner very easily could have been at the robbery scene committing the robbery at 11:20 or 11:30 a.m. Perhaps the most important part of James Fowler's testimony as it relates to an alibi defense is that he repeatedly stated that he never looked at a clock and therefore could not be certain of any times. Also of great importance was Petitioner's statement to the police that he himself had been in control of the vehicle the entire day up to the time when the police questioned him. If the robbery occurred between 11:20 and 11:30 a.m., Petitioner was the only person in control of the vehicle in question that day, and James Fowler could not be certain as to what times Petitioner was home or out of the house on the day/morning of the robbery, then an alibi defense was weak at best.

Considering the foregoing circumstances, there was a reasonable strategy for trial counsel to ***not*** seek an alibi instruction despite James Fowler's testimony. In fact, at trial Petitioner presented insufficient evidence to warrant giving the jury an alibi instruction since James Fowler's testimony did not make it impossible for Petitioner to have been the perpetrator of the robbery. Given the foregoing discussion, trial counsel's failure to seek an alibi instruction cannot be deemed "deficient." Furthermore, there is ***not*** a reasonable probability that had trial counsel sought an alibi instruction Petitioner would have been acquitted of the charges instead of convicted. Therefore, trial counsel's action, or in this case inaction, did not prejudice Petitioner.

B. Ineffective Assistance of Trial Counsel For Failing to File a Motion to Suppress the Commonwealth's Eyewitness' In-Court Identification.

Petitioner next argues trial counsel was ineffective for failing to file a motion to suppress the Commonwealth's key eyewitness' (Bruce Wagner's) in-court identification. Petitioner claims events leading up to the trial resulted in an impermissibly suggestive identification. The Pennsylvania Supreme Court has found "that identifications made only after a witness has seen the defendant in the media" constitute an "impermissible suggestive identification." *Commonwealth v. Carter*, 537 Pa. 233, 253, 643 A.2d 61, 71 (1994), *cert. denied*, 514 U.S. 1005 (1995). Furthermore, "[f]ollowing a suggestive pre-trial identification, a witness will not be permitted to make an in-court identification unless the prosecution establishes by clear and convincing evidence that the identification was not induced by events occurring between the time of the crime and the in-court identification. Thus, an in-court identification following a suggestive out of court identification will be admissible only if, considering the totality of the circumstances, it is determined that the in-court identification had an origin sufficiently distinguishable to be purged of the primary taint." *Id.* at 233, 253-54, 643 A.2d at 71 (internal citations omitted).

The record reflects that Bruce Wagner ("Wagner") first identified Petitioner at his preliminary hearing after Wagner had watched a news program that showed Petitioner in handcuffs after being arrested for the robbery and related crimes. Wagner had also seen Petitioner at a previously scheduled preliminary hearing and knew he was one of the persons charged in the incident. Therefore, Wagner's subsequent identification of Petitioner was an "impermissible suggestive identification." Despite this fact, even if Wagner did not have an independent basis for his identification of Petitioner, Petitioner was not prejudiced by trial counsel's failure to file a motion to suppress the identification. In addition to Wagner's identification of Petitioner at the preliminary hearing and at trial, Wagner also testified to the license plate number and a description of the car that the robbery perpetrators were driving. That was the same car the police found at Petitioner's home and Petitioner told the police he was the only person in control of the car on the day of the robbery.

Since there was evidence independent of Wagner's identification of Petitioner implicating Petitioner as the perpetrator of the robbery, there is no basis to conclude that there is a reasonable probability that the verdict would have been different if trial counsel had filed a motion to suppress the in-court identification. Hence, trial counsel cannot be deemed ineffective in this regard.

C. Ineffective Assistance of Trial Counsel For Failing to Request a Curative Instruction When the Commonwealth Admitted Prejudicial Evidence at Trial.

Petitioner's third ineffective assistance of trial counsel claim asserts that trial counsel was ineffective for failing to request a curative instruction when the Commonwealth presented evidence about the discovery of a shotgun during the search of Petitioner's bedroom. Ultimately, trial counsel had made a timely and appropriate objection regarding the admission of the shotgun as evidence, the objection was sustained, and the trial court excluded the shotgun from evidence, finding that the evidence was more prejudicial than probative. Moreover, trial testimony placed Petitioner in the vicinity of the crime scene at the time the crime was committed and included testimony that proceeds of the robbery were discovered where Petitioner's car had been parked. Additionally, the trial testimony regarding the discovery of the shotgun during the search of Petitioner's home was very brief.

Considering the foregoing circumstances, based on all the evidence presented connecting Petitioner to the robbery, there is no reason to conclude that there is a reasonable probability that there would have been a different outcome/verdict at trial had trial counsel requested a curative instruction regarding the brief testimony about the discovery of the shotgun during the search. Since Petitioner has failed to prove the prejudice prong of the ineffective assistance of counsel test, trial counsel cannot be deemed ineffective for failing to request a curative instruction regarding the testimony of the shotgun.

D. Ineffective Assistance of Trial Counsel For Failing to Request a Kloiber Instruction.

Petitioner's fourth and final claim of ineffective assistance of trial counsel is an assertion that trial counsel was ineffective for failing to request a Kloiber instruction. "A Kloiber instruction informs the jury that an eyewitness identification should be viewed with caution when either the witness did not have an opportunity to view the defendant clearly, equivocated on the identification of the defendant, or has had difficulties identifying the defendant on prior occasions." *Commonwealth v. Sanders*, 42 A.3d 325, 332 (Pa. Super. 2012), *appeal denied*, __Pa. __, 78 A.3d 1091 (2013). To the contrary, there was absolutely no basis for trial counsel to have requested a Kloiber instruction regarding Wagner's identification of Petitioner as the perpetrator of the robbery. A review of the record shows that Wagner never equivocated regarding his identification of Petitioner. Furthermore, Wagner identified Petitioner at the preliminary hearing, testified at trial that Petitioner looked right at him before Petitioner got out of the car the second time, and that he was absolutely positive that Petitioner was the person he saw driving the car on the day of the robbery. Hence, there was no basis for a Kloiber instruction and therefore trial counsel's failure to request one cannot be the basis for a successful claim of ineffective assistance of counsel.

Based on the foregoing discussion, it cannot be said that Petitioner has met the two-prong test for an ineffective assistance of counsel claim as set forth in *Strickland*. Petitioner has failed to show how trial counsel's performance was deficient, nor has he shown how counsel's alleged deficient performance actually prejudiced him. Consequently, Petitioner's claims of ineffective assistance of counsel are without merit and the Commonwealth does not believe Petitioner has met his burden for federal habeas corpus relief on these issues.

VII. CONCLUSION

WHEREFORE, based upon the foregoing discussion, Respondent requests that this Court dismiss/deny the Petition for Writ of Habeas Corpus in the above entitled action.

Respectfully submitted,

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